

No. 107816

JAN - : 2009

IN THE SUPREME COURT OF ILLINOIS

CLERK SUPREME COURT CHICAGO OFFICE

ROLAND W. BURRIS, LAWRENCE A. PERLMAN, and JOHN RUFF,	On Motion for Leave toFile Original Action in
i Diamini, and o office to 12,) Mandamus.
Petitioners,)
)
V.)
JESSE WHITE, in his official capacity as)
ILLINOIS SECRETARY OF STATE,)
Respondent.	ý

NOTICE OF FILING

TO: See attached Service List

PLEASE TAKE NOTICE that the undersigned filed one (1) original and ten (10) copies of Respondent Jesse White's Objection to Petitioner's Motion for Leave to File a Complaint for Writ of Mandamus with the Clerk of the Supreme Court of Illinois, Satellite Office, 160 North LaSalle Street, 20th Floor, Chicago, Illinois, 60601, by hand delivery on January 7, 2009, before 5:00 p.m. A copy of this response is hereby served upon you.

Respectfully submitted,

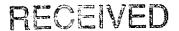
LISA MADIGAN Attorney General State of Minois

BY:

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No. 107816

JAM - 7 2000

CLERK SUPREME COURT CHICAGO OFFICE

IN THE SUPREME COURT OF ILLINOIS

ROLAND W. BURRIS, LAWRENCE A.)	On Motion for Leave to
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ILLINOIS SECRETARY OF STATE,)	
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Respondent.)	

RESPONDENT JESSE WHITE'S OBJECTION TO PETITIONERS' MOTION FOR LEAVE TO FILE A COMPLAINT FOR WRIT OF MANDAMUS

Respondent Jesse White, in his official capacity as Illinois Secretary of State (Secretary), by and through his attorney, Lisa Madigan, Attorney General of Illinois, hereby objects to the motion for leave to file a mandamus complaint filed by petitioners Roland W. Burris (Burris), Lawrence A. Perlman, and John Ruff.

I. Introduction

This Court should deny the petitioners' motion for leave to file an original mandamus complaint requesting an order requiring the Secretary to countersign the Certificate of Appointment of petitioner Burris to the United States Senate. The Secretary has performed all of his legal duties regarding the Burris appointment. This Court cannot compel the U.S. Senate to seat

petitioner Burris, but nothing remains to be done by the Secretary to complete the appointment process and to enable the U.S. Senate to seat Burris. Accordingly, the petitioners are not entitled to seek mandamus relief.

II. Factual Background

- 1. On December 9, 2008, Governor Rod Blagojevich was arrested and a federal criminal complaint was filed against him by U.S. Attorney Patrick Fitzgerald.
- 2. The complaint alleges that, among other purported conduct.

 Governor Blagojevich tried to sell the appointment to the U.S. Senate seat vacated by President-Elect Barack Obama.
- 3. On December 17, 2008, Ed Genson, attorney for Governor Blagojevich, stated that the Governor would not make an appointment to fill the vacant U.S. Senate seat.
- 4. On December 24, 2008, U.S. Congressman Danny Davis was contacted about the U.S. Senate appointment by Sam Adam, Sr., who indicated that the Governor was interested in appointing Davis to the seat. Monica Davey & Rachel Swarns, *Tough Calculus for Blagojevich on Senate Seat*, NEW YORK TIMES, January 1, 2009.
- 5. Congressman Davis indicated that he was not interested in the appointment on December 26, 2008. Davey & Swarns, supra.

- 6. On December 26, 2008, Sam Adam, Jr., contacted petitioner Burris to inquire whether he was interested in the U.S. Senate appointment. (Burris Affidavit at ¶¶ 3-5) (Attached as Exhibit 1).
- 7. On December 28, 2008, petitioner Burris informed the Governor that he would accept the appointment. (Burris Affidavit at ¶¶ 6-9).
- 8. On December 30, 2008, Governor Blagojevich held a news conference announcing his appointment of petitioner Burris to fill the U.S. Senate vacancy.
- 9. On December 30, 2008, Governor Blagojevich signed a "Letter of Appointment" stating that he intended to appoint petitioner Burris to the U.S. Senate seat vacated by President-Elect Barack Obama. (Proposed Complaint at ¶ 11, Ex. A at 1).
- 10. On December 31, 2008, the Secretary made a register of Governor Blagojevich's appointment of petitioner Burris to the U.S. Senate, pursuant to the Secretary's statutory duty to make a register of gubernatorial appointments, 15 ILCS 305/5(2) (2006). (Pet. Motion to Accelerate at ¶ 5. Ex. A).
- 11. On December 31, 2008, Governor Blagojevich, using a suggested U.S. Senate form, signed a Certificate of Appointment addressed to the President of the Senate stating that he was appointing petitioner Burris to the vacant U.S. Senate seat. (Proposed Complaint at ¶ 11, Ex. A at 2).

- 12. Having already made a register of the appointment as required by Illinois law, the Secretary has refused to countersign and affix the state seal to the U.S. Senate's recommended Certificate of Appointment. See (Proposed Complaint at ¶ 13).
- 13. Because Governor Blagojevich has been arrested and charged with trying to sell the U.S. Senate appointment, the Secretary believes that it would be a violation of his ethical obligations to the people of Illinois to lend his name and the state seal to further this effort by the Governor.
- 14. The petitioners filed their motion for leave to file an original mandamus action on December 31, 2008.
- 15. The petitioners request an order requiring the Secretary "to certify Governor Blagojevich's appointment of Mr. Burris to the office of United States Senator from the State of Illinois and to do all other acts required to confirm such appointment." (Proposed Complaint at p. 6).
- 16. The petitioners, however, also allege that Governor Blagojevich's appointment of petitioner Burris to the Senate was "effective immediately and there is no need for further confirmation by any other official from the State of Illinois, including but not limited to, Secretary White." (Proposed Complaint at ¶ 14).

III. Argument

17. This Court should deny the petitioners' motion for leave to file an original complaint for mandamus because the petitioners do not and cannot

allege a clear entitlement to the relief that they request, that the Secretary failed to perform any duty required by law, or that the petitioners have no other available remedy.

A. Requirements of a mandamus action.

18. The petitioners' motion should be denied because they do not and cannot allege a clear entitlement to the relief they seek. "Mandamus is an extraordinary remedy traditionally used to compel a public official to perform a purely ministerial duty." People ex rel. Ryan v. Roe, 201 III. 2d 552, 555 (2001). An order of mandamus may issue only where the party seeking relief has established (1) a clear, affirmative right to relief; (2) a clear duty in the public official to act: (3) a clear authority in the public official to comply with the order: and (4) the lack of other remedies. Holly v. Montes. 231 Ill. 2d 153. 159 (2008): People ex rel. Devine v. Stralka, 226 Ill. 2d 445, 449 (2007). The petitioners bear the burden of establishing a clear right to the mandamus relief they seek, Holly, 231 Ill. 2d at 159; 1350 Lake Shore Assocs. v. Healey, 223 Ill. 2d 607, 628 (2006), and to plead a mandamus action properly, the petitioners must allege facts sufficient to establish each of the above elements. Novola v. Bd. of Educ. of City of Chicago, 179 Ill. 2d 121, 133 (1997). The petitioners cannot satisfy these elements here.

- B. The petitioners seek to compel the Secretary to perform an act that he has no legal duty to perform.
- 19. The Illinois Election Code specifies the process to fill a U.S. Senate vacancy in Illinois. 10 ILCS 5/25-8 (2006). That statute provides that the Governor "shall make temporary appointment" to fill the vacancy, and it does not require the Secretary to undertake any action to effectuate the Governor's appointment. *Id.* This statute, then, cannot be the basis for mandamus against the Secretary.
- 20. Additionally, the Secretary has performed all of his legal duties under the Secretary of State Act (Act). Section 5(2) of the Act applies to gubernatorial appointments, including the Burris appointment, and requires the Secretary to "make a register of all appointments by the Governor." 15 ILCS 305/5(2) (2006). There is no dispute in this case that the Secretary immediately registered the appointment. (Pet. Motion to Accelerate at ¶ 5. Ex. A). By doing so, he performed all of his legal duties under the Act. Significantly, the registration requirement does not require the Secretary to countersign or affix the state seal to any document. 15 ILCS 305/5(2) (2006).
- 21. The petitioners purport to base their mandamus claim on section 5(1) of the Act, 15 ILCS 305/5(1) (2006), which requires the Secretary to "countersign and affix the seal of state to all *commissions* required by law to be issued by the Governor." (Proposed Complaint at ¶¶ 14, 19-20) (emphasis added). They contend that under this provision they have a clear right to

have the Secretary countersign and affix the state seal to the Certificate of Appointment, that the Secretary has a clear duty to countersign and affix the state seal to the Certificate, and that the Secretary has clear authority to countersign and affix the state seal to the Certificate. (Proposed Complaint at ¶ 20).

- 22. But it is section 5(2) that pertains to gubernatorial appointments like this one, and the Secretary has fully complied with this section by making a register of petitioner Burris's appointment. Section 5(1) has nothing to do with "appointments." Rather, it requires the Secretary to countersign and affix the state seal to "commissions required by law to be issued by the Governor." 15 ILCS 305/5(1) (2006) (emphasis added). This provision unambiguously requires an underlying legal obligation on the Governor to issue a commission. Thus, the Secretary's legal duty under section 5(1) is triggered only where he is presented with a commission that the Governor was required by law to issue.
- 23. Indeed, the General Assembly reserves the need for "commissions" to rare, specifically designated circumstances. For instance, the members of the boards of county commissioners "shall be commissioned by the governor," 55 ILCS 5/2-4001 (2006), "[c]ounty clerks shall be commissioned by the governor," 55 ILCS 5/3-2006 (2006), "[e]very sheriff shall be commissioned by the Governor," 55 ILCS 5/3-6001 (2006), and the clerks of courts "shall be commissioned by the governor," 705 ILCS 105/3 (2006). In those cases, the

commissions are specifically "required by law to be issued by the Governor." and, in turn, the Secretary must countersign and affix the state seal under section 5(1) of the Act. 15 ILCS 305/5(1) (2006).

- 24. There is no legal requirement for a U.S. Senate appointee to be commissioned by the Governor as opposed to appointed, a distinct legal concept and the Secretary's duty under section 5(1) therefore is different and not implicated in this situation. Put simply, Illinois law does not require a gubernatorial commission for the appointment of a U.S. Senator. Only a gubernatorial appointment is required. 10 ILCS 5/25-8 (2006).
- 25. In their motion to accelerate consideration of this case, the petitioners rely on section 5 of the Act as a whole as authority for ordering the Secretary to undertake action. (Pet. Motion to Accelerate at ¶ 5). But none of the other duties imposed on the Secretary by section 5 support the petitioners' mandamus claim, either. The only other section that could possibly apply is section 5(8), which requires the Secretary to "perform such other duties as may be required by law." 15 ILCS 305/5(8) (2006). But the petitioners have not identified any law requiring the Secretary to perform the duties they seek to compel because there is none.
- 26. Nor, finally, do the Standing Rules of the United States Senate impose a legal duty on the Secretary to countersign and affix the state seal to the Certificate of Appointment. U.S. Senate Standing Rule II (Rule II) (attached hereto as Exhibit 2) governs the presentation of credentials of

Senate Appointees. Under Rule II, the Secretary of the U.S. Senate shall send copies of a "recommended" form for the appointment of a U.S. Senator to the Governor and Secretary of State, and the Certificate of Appointment presented by Governor Blagojevich for the Burris appointment follows the recommended form. (Compare Proposed Complaint, Ex. A at 2 with Ex. 2 hereto). But Rule II is explicit that the appointing Governor and the Secretary of State "may use such form" only "if they see fit" to do so. It is not required.

- 27. Indeed, nothing in Rule II imposes a legal duty on the Secretary. The form of the presentation of the Senate Appointee's credentials is a matter that Rule II expressly leaves to the discretion of the appointing State officials and cannot be the basis of mandamus against the Secretary. Where Congress intends a State's secretary of state to play a formal role in the seating of a U.S. Senator, it does so explicitly and in law. Compare 2 U.S.C. §§ 1(a), (b) (where U.S. Senator is elected, State must certify election under state seal, and certification of election "shall be countersigned by the secretary of state of the State").
- 28. The petitioners do not and cannot identify any legal source of the supposed duty they seek to enforce. It is the petitioners' burden to establish their clear right to have the Secretary countersign and affix the state seal to the Certificate of Appointment, see Healey, 223 Ill. 2d at 628, and their failure to identify a legal requirement that the Secretary do so dooms their

mandamus action. The proposed complaint is thus legally and factually inadequate, and the motion to file the complaint should be denied.

29. Nor can petitioners satisfy the separate requirement for a mandamus action that they have no other adequate remedy. See Stralka.

226 Ill. 2d at 449. The Secretary has performed all of his legal duties and the ultimate determination whether to seat petitioner Burris lies with the U.S. Senate. That, too, is where the petitioners' remedy lies.

WHEREFORE. Respondent Jesse White, as Secretary of State of Illinois, respectfully requests that this Court deny the petitioners' motion for leave to file an original action in mandamus.

Respectfully submitted.

LISA MADIGAN Attorney General State of Illinois

BY:

BRETT E. LEGNER
Assistant Attorney General
100 West Randolph St.
12th Floor
Chicago, Illinois 60601

(312) 814-2146

STATE OF ILLINOIS

COUNTY OF COOK

AFFIDAVIT OF ROLAND W. BURRIS

I, ROLAND W. BURRIS, being first sworn on oath, depose and state that the following is true to the best of my knowledge and recollection:

- 1. I am the Senator-Designate for the State of Illinois.
- 2. I am a resident of the State of Illinois, at least 30 years of age and a naturalborn citizen of the United States of America.
- 3. On Friday, December 26, 2008, I received a telephone call from Sam Adams, Jr., ("Mr. Adams, Jr.") an attorney employed by Rod Blagojevich, the Governor of the State of Illinois ("Governor Blagojevich").
- During the December 26, 2008 telephone conversation with Mr. Adams, Jr., he asked if he could come to my residence to discuss a matter with me and I agreed.
- 5. At my residence Mr. Adams Jr. asked if I had an interest in accepting Governor Blagojevich's appointment to fill the Senate seat left vacant by President-Elect Barack Obama. I responded to Mr. Adams, Jr. that I needed a couple of days to confer with friends and family and that I would inform him of my decision within a couple of days.
- 6. On Sunday, December 28, 2008, Mr. Adams Jr. contacted me by telephone and then visited me at my home to ask me if I had reached a decision with respect to accepting or rejecting Governor Blagojevich's appointment to the United States Senate.
- 7. I told Mr. Adams Jr. that, should Governor Blagojevich offer the appointment to the United States Senate, I would accept.
- 8. On Sunday, December 28, 2008, at approximately 4:00 p.m., Governor Blagojevich personally contacted me by telephone, praised my public service record and offered to appoint me to the United States Senate to fill the Senate seat left vacant by President-Elect Barack Obama.
- 9. During the December 28, 2008 telephone conversation with Governor Blagojevich, I formally accepted the appointment to the United States



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Senate. Governor Blagojevich then indicated that he would formally announce my appointment at a press conference within the next couple of days. The telephone call then ended.

- 10. Other than greetings, Governor Blagojevich praising my public service record, his offer and my acceptance of the appointment to the United States Senate, and the discussion of the future press conference to announce my appointment, Governor Blagojevich and I discussed no other topics or subject matter during the December 28, 2008 telephone conversation.
- 11. Prior to the December 26, 2008 telephone call from Mr. Adams, Jr., there was not any contact between myself or any of my representatives with Governor Blagojevich or any of his representatives regarding my appointment to the United States Senate.

FURTHER AFFIANT SAYETH NAUGHT.

Koland W. Burns
ROLAND W. BURRIS

Senate-Designate for the State of Illinois

Subscribed and sworn to me this 5th of January, 2009

NOTARY PUBLIC

OFFICIAL SEAL
DARRYL TOM
Notary Public - State of Illinois
My Commission Expires Jun 18, 2012

United States Senate COMMITTEE ON RULES & ADMINISTRATION

Purpose & Jurisdiction

Rules of the Senate Committee Members Hearings & Markups

Committee History

Newsroom

Standing Rules of the Senate PRESENTATION OF CREDENTIALS AND QUESTIONS OF PRIVILEGE

- 1. The presentation of the credentials of Senators election of Senators designate and other questions of privilege shall always be in order, except during the reading and correction of the Journal, while a question of order or a motion to adjourn is pending, or while the Senate is voting or ascertaining the presence of a quorum; and all questions and motions ausing or made upon the presentation of such credentials shall be proceeded with until disposed of
- 2. The Secretary shall keep a record of the certificates of election and certificates of appointment of Senators by entering in a wellbound book kept for that purpose the date of the election or appointment, the name of the person elected or appointed, the date of the certificate, the name of the governor and the secretary of state signing and countersigning the same, and the State from which such Senator is elected or appointed
- 3. The Secretary of the Senate shall send copies of the following recommended forms to the governor and secretary of state of each State wherein an election is about to take place or an appointment is to be made so that they may use such forms if they see fit.

THE RECOMMENDED FORMS FOR CERTIFICATE OF ELECTION AND CERTIFICATE OF APPOINTMENT ARE AS FOLLOWS:

CERTIFICATE OF ELECTION FOR SIXYEAR TERM

To the President of the Senate of the United States:

This is to certify that on the __ day of __, 19_, A__ B__ was duly chosen by the qualified electors of the State of . Senator from said State to represent said State in the Senate of the United States for the term of six years, beginning on the 3d day of January, 19___

Witness: His excellency our governor [1], and our seal hereto affixed at [1] this [1] day of [1], in the year of our Lord 19[1].

By the governor:

C__ D. . Gavernor.

E . F____, Secretary of State.

CERTIFICATE OF ELECTION FOR UNEXPIRED TERM

To the President of the Senate of the United States:

This is to certify that on the ___day of ___, 19___, A___B__ was duly chosen by the qualified electors of the State of ___ a Senator for the unexpired term ending at noon on the 3d day of January, 19__, to full the vacancy in the representation from said State in the Senate of the United States caused by the ___ of C__ D___

witness: His excellency our governor __, and our seal hereto affixed at ___ this __ day of __, in the year of our Lord 19_ .

By the governor

E. F., Governor

G___ H, __, Secretary of State.



CERTIFICATE OF APPOINTMENT

To the President of the Senate of the United States:

This is to certify that, pursuant to the power vested in me by the Constitution of the United States and the laws of the State of $[..., 1, A_{...}, B_{...}]$, the governor of said State, do hereby appoint $C_{...}, D_{...}$ a Senator from said State to represent said State in the Senate of the United States until the vacancy therein caused by the [...] of $E_{...}, F_{...}$, is filled by election as provided by law.

 $\text{Witness: His excellency our governor $\underline{\quad}$, and our seal hereto affixed at $\underline{\quad}$ this $\underline{\quad}$, day of $\underline{\quad}$, in the year of our Lord 19$$$.}$

By the governor: $G_1 \subseteq H_{1,2}$. Governor.

I...J.....
Secretary of State.

305 Russell Building United States Senate Washington, DC 20510 202-224-6352

STATE OF ILLINOIS)	
)	SS.
COUNTY OF COOK)	

PROOF OF SERVICE

The undersigned being first duly sworn upon oath, deposes and states that one copy of the foregoing Respondent Jesse White's Objection to Petitioners' Motion for Leave to File a Complaint for Writ of Mandamus and Notice of Filing by Mail was served upon the below-named persons on January 7, 2009, by hand

The Honorable Thomas R. Fitzgerald, Chief Justice
Supreme Court of Illinois
Supreme Court of Illinois
Supreme Court of Illinois
160 North LaSalle Street, 20th Floor
Chicago, Illinois 60601
Chicago, Illinois 60601
The Honorable Charles E. Freeman, Justice
Supreme Court of Illinois
160 North LaSalle Street, 20th Floor
Chicago, Illinois 60601

The Honorable Anne M. Burke, Justice Supreme Court of Illinois 160 North LaSalle Street, 20th Floor Chicago, Illinois 60601

Timothy W. Wright, III Gonzalez, Saggio and Harlan, L.L.C. 35 East Wacker Drive, Suite 500 Chicago, Illinois 60601

And on the below-named persons on January 7, 2009, by depositing such copy in the United States mail at 100 West Randolph Street, Chicago, Illinois, by 5 p.m. in envelopes bearing sufficient postage.

The Honorable Robert R. Thomas, Justice Supreme Court of Illinois 1776 South Naperville Road Building A, Suite 207 Wheaton, Illinois 60187

The Honorable Thomas L. Kilbride, Justice Supreme Court of Illinois

The Honorable Lloyd A. Karmeier, Justice Supreme Court of Illinois 110 South Mill Street P.O. Box 266 Nashville, Illinois 62263

The Honorable Rita B. Garman, Justice Supreme Court of Illinois

1819 Fourth Avenue Rock Island, Illinois 61201 3607 North Vermilion Suite 1 Danville, Illinois 61832

Reta Maldenale

SUBSCRIBED and SWORN to before me this 7th day of January, 2009.

NOTARY PUBLIC

TO COMPANY OF THE PROPERTY OF

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